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IN THE

Supreme Court of the United States

October Term, 1963

No. 703

SKOKOMISH INDIAN TRIBE,
a corporation,
Petitioner,

v.

E. L. FRANCE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. RYAN, JR.
RAYMOND C. SWANSON
RYAN, ASKREN, CARLSON, BUSH & SWANSON,
545 Henry Building
Seattle, Washington
Counsel for Respondent
Simpson Logging Company

Of Counsel:
F. JOSEPH DONOHUE
DONOHUE, KAUFMAN & SHAW
Judiciary Square, 503 D St. N.W.
Washington, District of Columbia

METROPOLITAN PRESS AND WESTERN SEATTLE, WASHINGTON

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Respondent Simpson Logging Company opposes the issuance of a writ of certiorari. The decision herein properly turned on factual determinations. The Trial Court, after thoroughly considering the evidence, found against petitioner's contentions and entered findings accordingly. The Court of Appeals reviewed the record and found the findings to be supported by substantial evidence. This is not an appropriate instance for the Supreme Court to exercise its discretion under Rule 19 by writ of certiorari to review the case further.

CITATIONS TO OPINIONS BELOW

The unpublished memorandum opinion of the District Court from which the petitioner appealed is contained in the record herein. The opinion of the Court of Appeals

for the Ninth Circuit is printed as Appendix A to the Petition for Writ of Certiorari and is reported at 320 F.(2d) 205 (1963).

JURISDICTION

In addition to petitioner's statement, it should be noted that the time for filing all responses to the Petition for Writ of Certiorari was extended to February 24, 1964, by John F. Davis, clerk, United States Supreme Court.

QUESTIONS PRESENTED

1. Should the Supreme Court exercise its discretion by way of a writ of certiorari to review a case where there have been concurrent findings of fact by the Trial Court and the Court of Appeals and agreement by the two courts as to proper application of the rules of construction of treaties to the facts so determined?

2. Does the mere fact that the result was unfavorable to the Indians (petitioner) justify the assumption that both of the courts below incorrectly applied said rules of construction?

STATUTES INVOLVED

The pertinent treaty between the Indians and the United States of America was entered in on January 26, 1855, ratified March 8, 1859, and proclaimed April 29, 1859 (12 Stats. 933). The Executive Order was signed by President U. S. Grant and dated February 24, 1874. The Washington Enabling Act is found at 25 Stats. Chapter 180, Page 676.

STATEMENT OF THE CASE

This action was brought to quiet title to a narrow strip of tidal land abutting the original Skokomish Indian reservation. The tidal strip is bordered on the land side by the private property of respondents and on the water side by public navigable water. The strip has no value except to the abutting upland respondent owners, whose ownership of the uplands is not in question, as a means of access to navigable water. The abutting uplands were legally allotted to Indians and legally conveyed by them, with government approval, to and vested in respondents and their predecessors in title (Fdg. 9). There is no longer any Indian or reservation land along any of the waterfront and, accordingly, petitioner and its members do not have any access to the strip except via the water (Fdgs. 10 and 11).

Respondent Simpson Logging Company is only concerned with a stretch of tideland located in Section 26, which is a particularly narrow and rocky stretch of tideland (Fdg. 21). Section 26 has a separate and different history, having been part of the Fisher homestead and not part of the original reservation. The Fisher donation claim was added to the reservation by purchase and it is this respondent's contention that the tidelands were not included.

Prior to the commencement of this action in 1948, petitioner and its members did not assert title to any of the tidelands in controversy. The State of Washington began selling the tidelands about 1901 to respondents and their predecessors in title who have occupied the

lands continuously since their acquisition, have paid taxes thereon, and have made extensive improvements upon portions of the land (Fdgs. 25 through 30, inclusive, and 37).

As noted by both the trial and appellate courts, it was conceded that neither the treaty nor the executive order expressly included the tidelands at issue as part of the reservation. The petitioner, however, sought to show that the tidelands were essential to the Indians' livelihood and hence the parties at the time of the treaty must have intended them to be part of the reservation. The contention involved not only the issue of intent, but also the underlying issues of whether the tidal strip could or ever did contain usable quantities of shell fish, and whether the Indians were dependent upon or derived material subsistence therefrom.

The Trial Court, after hearing a wide range of testimony and evidence, expressly found against such contention of petitioner and made extensive findings of fact. The Court of Appeals, after a careful review of the record in its entirety, stated:

> "... it is our conclusion that the findings are not clearly erroneous, but, on the contrary, are amply supported by the evidence."

The tidal strip has never been and is not now a source of shell fish in usable quantities (Fdgs. 20, 21 and 31). The low salinity in this particular locale explains why the shell fish and marine life of interest to Indians was found several miles distant from this tidal strip (Fdgs. 19 and 22). Outside of berries and deer the Indians depended

primarily on salmon caught in the Skokomish River, which is the only salmon river entering Hood Canal passing through the reservation (Fdgs. 14, 15 and 17). The livelihood of the Indians was not dependent in material degree upon shell fish or any type of fishing on or from the tidelands in issue (Fdg. 18).

Factually, it should be noted that this action does not involve "fishing rights." The treaty involved states in Article IV thereof:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . ."

No one has challenged the Indians' rights to exercise the privileges granted by Article IV of the treaty, and no issue in this case involves that consideration. This is solely an action to try title to a submerged tidal strip.

This case has been fully and competently tried and reviewed by the courts below and should not be reviewed again by way of writ of certiorari.

ARGUMENT

The petitioner under the heading "Questions Presented" raises two questions. The first question deals with the intent of the parties to the treaty and is in essence a question of fact. The Trial Court found against petitioner's contentions and entered findings accordingly. The Court of Appeals reviewed the record and found the findings to be supported by substantial evidence. Accordingly, this is not an appropriate instance for the Supreme Court to exercise its discretion by writ of certiorari to review

the case further. As stated by the Supreme Court in *Graver Mfg. Co. v. Linde*, 336 U.S. 271 (1949) at page 275:

> "A court of law, such as this court is, rather than a court for correction of errors in fact, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The second question, as stated by petitioner, creates some confusion since in the five cases cited on pages 2 and 3 of its brief there are five errors, either with respect to the case name or the page citation. Furthermore, it does not actually state a question and two of the cases cited at this point are not mentioned in petitioner's argument portion of the brief. In any event, it appears petitioner is questioning whether the Court of Appeals properly applied the correct rules of construction to the treaty and the executive order. A reading of the Court of Appeals' opinion clearly shows the court fully understood the proper rules of construction and, in light of the findings of fact, correctly applied them in reaching its decision.

Next, we will address ourselves to the "Reasons" stated by petitioner for granting certiorari and their argument in support thereof. In the first and second Reasons it is contended there is an inconsistency between the decision herein and prior decisions of the United States Supreme Court and the Ninth Circuit Court of Appeals. Petitioner states "the first issue before the court below concerns the intention of the Indians and the United States when they held the treaty conference in 1855 . . ."

This is a factual question which has been thoroughly reviewed by both courts below. Any apparent inconsistency in results between this and other cases is fully explained by the difference in facts. Accordingly, the decision herein does not have the far-reaching effect asserted by petitioner, but rather is only of major importance to these litigants. As stated in *United States v. Stotts*, 49 F.(2d) 619, 621 (1930) (a case cited by petitioner in Appendix D):

> "Each treaty and proclamation must rest upon its own provisions."

The principal cases apparently relied upon by petitioner in support of Reasons 1 and 2 are *Moore v. United States*, 157 F.(2d) 760 (1946); *Northern Pacific Railway Co. v. United States*, 227 U. S. 355 (1913), and *United States v. Winans*, 198 U. S. 371 (1905). The first two cases were specifically and clearly distinguished by the Court of Appeals in its opinion on the basis of the facts involved. (See pages 30 and 31 of the Petition for Writ of Certiorari herein.) The *Winans* case is properly distinguishable on the same basis. There, fishing rights were involved and the Indian was being deprived of his right to take fish at the usual and accustomed places. This is far different from the facts involved herein, as noted in the Statement of the Case.

Appendix D used by petitioner in support of reason No. 1 is inconclusive and misleading. The appendix is not part of the record, having been presented for the

first time in the petition, and should not be considered by the court unless a full and comprehensive analysis is made of all of the treaties and reservations in the Pacific Northwest bordering tidal water. If such an approach truly has merit, the table (Appendix D) should have been prepared and presented at the time of trial.

In any event, it should be noted that Appendix D only refers to three cases outside of the present one. In two of the cases the description specifically included the low water mark and the third decision was based on the phrase, "sufficient for his wants," together with a factual pattern of use and need for the tidelands. This latter case, *Moore v. United States*, 157 F.(2d) 760 (9th Cir. 1946), was specifically distinguished by the Court of Appeals in this case. (See page 30 of the Petition for Writ of Certiorari.)

The 3rd and 4th Reasons stated by petitioner relate to the rules of treaty construction. The petitioner has cited several cases in this regard, but has failed to direct the court's attention to more recent United States Supreme Court decisions which clarify and set forth the rules of construction. These cases, namely, *Choctaw Nation v. United States*, 318 U. S. 423 (1943); *Ute Indians v. United States*, 330 U. S. 169 (1947), and *Shoshone Indians v. United States*, 324 U. S. 335 (1945), were cited by the Court of Appeals. In its opinion, the Court of Appeals specifically quoted the following portion of the Supreme Court's opinion in the *Choctaw Nation* case, *supra*:

"Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. (Citing cases.) Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' (Citing cases.) *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.* (Citing cases.) (Emphasis supplied.)" (320 F.(2d) at page 207 and page 20 of Petition for Writ of Certiorari—Appendix A.)

and the following portion of the Supreme Court's opinion in the *Shoshone Indians* case, *supra*:

"Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian to the Indians, to our ward's prejudice. 'All doubts,' say petitioners, 'must be resolved in their (the Indians') favor.' Mr. Justice McLean, concurring in *Worcester v. Georgia*, 6 Pet. 515, at 582, said, 'The language used in treaties with the Indians should never be construed to their prejudice.' But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty.[16] That, we think, is the rule which the court has applied constantly to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the

United States and the Indians, is for the Congress."[17] (320 F.(2d) 205 at 207 and 208, and page 21 of Petition for Writ of Certiorari—Appendix A.)

"16. This is the meaning of the other cases which were cited by petitioners upon this point, *Jones v. Meehan*, 175 U. S. 1, 10-12; *United States v. Winans*, 198 U. S. 371, 380; *Marlin v. Lewallin*, 276 U. S. 58, 64; *United States v. Payne*, 264 U. S. 446, 448-49; *Northern Pacific R. Co. v. United States*, 227 U. S. 355, 366; *Scufert Bros. Co. v. United States*, 249 U. S. 194, 198; *United States v. Shoshone Tribe*, 304 U. S. 111, 116; see also *Tulee v. Washington*, 315 U. S. 681, 684."

"17. *United States v. Choctaw Nation*, 179 U. S. 494, 534-36; *Choctaw Nation v. United States*, 318 U. S. 423, 432."

(NOTE: The above footnotes have been taken from the Supreme Court's opinion, 324 U. S. 335 at page 353, and inserted at the appropriate place in the Court of Appeals' opinion.)

In reading the above portion of the Supreme Court's opinion in the *Shoshone* case, *supra*, the footnote citations thereto should be noted since they include a majority of the cases cited by petitioner in this connection. The only more recent case cited is *Hynes v. Grimes Packing Co.*, 337 U. S. 86 (1949), a case which is not relevant here. The *Hynes* case involved an Indian reservation in Alaska which was created pursuant to the Act of Congress of May 1, 1936 (49 Stat. 1250) wherein certain tidelands and coastal waters extending 3,000 feet from the shoreline at mean low tide were *specifically* granted. The question was whether the phrase "public lands" used in the Act prohibited the granting of tidelands and coastal waters.

It appears clear that in the case now before this court the Court of Appeals fully recognized the proper rules of construction to be applied to treaties. However, the petitioner attempts to evade this by referring again to older declarations by the Supreme Court and ignoring the more recent ones which clarify the rules of construction. Certainly, petitioner is in error and is unwarranted in

making the following statement:

> "Another reason that certiorari should be granted is that the Circuit Court has erroneously applied the rules of treaty construction and *has completely* ignored prior cases determined by the Supreme Court . . ." (Page 6 of the Petition for Writ of Certiorari.) (Emphasis supplied.)

Petitioner seems to reason that, since the decision was unfavorable to the Indians, the rules of construction must have been erroneously applied. In doing so, petitioner continues to ignore the importance of the facts as determined by the court.

When one considers the findings of fact made by the Trial Court and approved by the Court of Appeals, it becomes clear that the rules of construction were correctly applied. As stated by the Court of Appeals:

> "The use of the tidelands by the Indian tribe, as disclosed by the evidence, *does not* support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands." (Emphasis supplied.) (320 F.(2d) 205 at page 210 and pages 25-26 of the Petition for Writ of Certiorari—Appendix A.)

An illustration of petitioner's completely ignoring the importance of the facts, as determined by the court, is the following unwarranted conclusion stated on page 6 of the Petition for Writ of Certiorari:

> "The court below has judicially legislated that, if a necessary and imperative adjunct to the aboriginal subsistence is not precisely described by metes and bounds, it is not a part of the reserve and all doubt

must be resolved in favor of the State and against the Indian."

First, the evidence clearly established that the tidelands in question were not "a necessary and imperative adjunct to the aboriginal subsistence" for many reasons, not the least of which is that the Indians' existence depended primarily upon fishing in the Skokomish River. Further, to the extent that the Indians depended on Hood Canal, they were not restricted to the reservation or the abutting tidelands, but rather, by Article IV of the treaty, they were guaranteed their right to take fish at their usual and accustomed grounds and stations throughout Hood Canal in common with all citizens of the United States. Second, the court did not resolve doubts in favor of the state, but rather based its opinion strictly on the evidence presented. This is clearly shown by the following summary portion of the Trial Court's memorandum opinion, which was quoted with approval by the Court of Appeals:

"Allowing in full measure for the inequalities of understanding and position of the parties negotiating the treaty and giving full effect to the rules of treaty construction favoring the primitive Indians, on the entire record in the present case, this court is fully satisfied that not any one of the parties negotiating the treaty of 1855 had the slightest thought or intention that the treaty or the executive order to follow would vest ownership to the tidelands in question in the Skokomish or in any other Indian tribe. On the contrary, the record of negotiations, the language and substance of the treaty, the specific terms of the executive order, and all pertinent circumstances shown by the evidence negative understanding or intent to such effect by any of the parties negotiating the treaty or concerned with or by the order. Considering the absence of support for any such con-

> tention, the long delay in any mention or assertion thereof is not surprising." (320 F.(2d) 205 at page 212 and page 29 of the Petition for Writ of Certiorari —Appendix A.)

Petitioner tries to avoid the above by making the following statement on pages 10 and 11 of the petition:

> "It is, to us, an untenable construction to place upon this treaty to say that the means of ingress and egress from the land to the water is cut off by an invisible line imposed by the treaty."

Even if the Indians owned the tidelands, they cut off any access by land when they sold the abutting upland allotments to the appellees or their predecessors in title with the government's approval. Such action is more consistent with the following: (1) the Indians did not consider themselves as the owners of the tidelands in question, and (2) said tidelands were not of importance to the Indians.

Not only did petitioner fail to meet its burden of proof, but the courts below found the evidence to be to the contrary. The basic question of intention was a factual issue to be determined by the court in light of all of the surrounding circumstances. This has been thoroughly considered and determined by the Trial Court and reviewed by the Court of Appeals. Accordingly, this case does not need to be reviewed by the United States Supreme Court by Writ of Certiorari.

As pointed out in the quotations used by the Court of Appeals, the court will attempt to determine what the parties meant by the treaty, but will stop short of varying

its terms to meet alleged injustices. The latter is a matter for Congress. If, in fact, the petitioner tribe was not adequately provided for by the treaty and executive order, this matter can presumably be rectified by the Indian Claims Commission, before whom the petitioner tribe presently has a claim pending. As the Trial Court properly raised in its memorandum opinion:

> "The defendants in the instant case purchased and substantially improved their properties in complete good faith and without the slightest knowledge, actual or constructive, of the title claim now so belatedly asserted. Whatever public atonement for early day wrongs may be due the Skokomish Indians granting the relief sought in the present case is not justified by the evidence presented or by the law applicable thereto." (320 F.(2d) 205 at 213 and page 32 of the Petition for Writ of Certiorari—Appendix A.)

The petition for a writ of certiorari herein should be denied.

Respectfully submitted,

JOHN E. RYAN, JR.
RAYMOND C. SWANSON
Counsel for Respondent Simpson Logging Company

F. JOSEPH DONOHUE
of Counsel

February 21, 1964